United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2493

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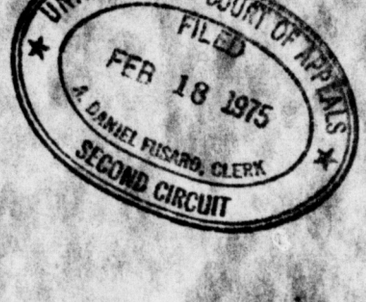
P/S

Brief
Michael Autuori



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74-2493

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 74-2493

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

VS.

MICHAEL ALSTON

DEFENDANT-APPELLANT

BRIEF OF DEFENDANT - APPELLANT

MICHAEL ALSTON

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INDEX

CASES CITED

PRELIMINARY STATEMENT REGARDING ISSUES ON APPEAL BRIEFED BY CO-DEFENDANTS

In an effort to minimize time and expense in the preparation and presentation of this appeal, counsel for the defendants have apportioned among themselves responsibility for briefing and arguing issues common to all the defendants.

Accordingly, the defendant-appellant Michael Alston respectfully asks the benefit of the briefs and appendices to briefs of the co-defendants Harold Simmons and James Haskins.

STATEMENT OF THE CASE

Defendant, with two co-defendants, was charged with a bank robbery in a single indictment filed July 20, 1974, charging the usual three counts of bank robbery plus a fourth count alleging conspiracy to do the same.

Simmons stood mute at time of plea and a not guilty plea was entered on his behalf. On September 9, 1974 a jury trial commenced before Judge Newman. On October 23, 1974 the jury returned a verdict on Counts I, II and III of the indictment, the conspiracy count having been withdrawn from jury consideration. Defendant, on November 13, 1974, was sentenced to 25 years imprisonment.

STATUTE INVOLVED

Title 18 United States Code, Section 3504 provides in pertinent part:

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department officer, agency, regulatory body, or other authority of the United States--
> (a) (1) Upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act.

QUESTION PRESENTED

1. Was the government's denial of electronic surveillance of the defendants adequate where that denial did not encompass a search of the records of the Central Intelligence Agency and that Agency has subsequent to the government's denial admitted electronic surveillance and other investigation of American citizens within the United States?

THE FACTS

All defendants were convicted by a jury of bank robbery offenses arising out of the armed robbery of the Westville Branch of the New Haven Savings Bank on May 3, 1974. Before the trial the defendants filed a Motion to Suppress Evidence Derived From Unlawful Electronic Surveillance, alleging that their conversations had been "overheard by means of electronic surveillance as part of a continuing program by federal, state and local authorities to spy on revolutionaries and political activists." (App. 10). This motion was filed on September 19, 1974.

On November 1, 1974, after the jury had returned its verdicts but before sentencing, the government replied to the defendants' motions by asserting "that no electronic surveillance was employed in this matter." (App. 12). This denial was substantiated by an affidavit from the Assistant United States Attorney prosecuting the case setting forth the inquiries he had made, why he had made them, and the negative responses he had received. (App. 13-15). Seven federal agencies were requested to furnish information. (App. 14-15). According to the Affidavit of the Assistant United States Attorney,

> "These Agencies were selected as appropriate for inquiry because at the time of this request they were the only Agencies that had requested

> authority to conduct and had conducted electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Public Law 90-351. I am advised that all national security electronic surveillance authorized by the Attorney General has been conducted solely by and all records of such surveillance are maintained by the Federal Bureau of Investigation." (App. 15).

At the next court day in this case--sentencing day--the defendants challenged the adequacy of the government's denial on the specific grounds that the government had not inquired of state and local agencies about wiretapping. Supplemental submissions were filed by the defendants and by the government on the issue of surveillance by non-federal agencies. (App. 41-53).

Approximately two months later, after this appeal had been filed and docketed, it became apparent that the government attorney had been misinformed or misled. As the affidavit of counsel attached to this brief discloses, the director of the Central Intelligence Agency (CIA) stated that:

1. The Central Intelligence Agency has conducted investigation of persons and organizations within the National boundaries of the United States, an activity beyond its statutory authority. These activities were not halted until March, 1974.

2. The Central Intelligence Agency used wire-tapping within the national boundaries of the United States, to gather information, at a time when neither the CIA nor any other federal agency had statutory authority to do so.

3. The Central Intelligence Agency took part in interagency exchange of information with a number of other federal agencies, including the F.B.I., concerning "American dissidents" and that such exchange of information continued until March, 1974.

A R G U M E N T

IN LIGHT OF RECENT DEVELOPMENTS SHOWING THE INADEQUACY OF THE GOVERNMENT'S DENIAL OF ELECTRONIC SURVEILLANCE BELOW, THIS CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR A HEARING TO DETERMINE WHETHER THERE HAS BEEN UNLAWFUL ELECTRONIC SURVEILLANCE OF THE DEFENDANTS (OR THEIR PREMISES) WHICH HAS TAINTED THE PROSECUTION.

A. The Disclosures Made By CIA Director Colby Show That The Government's Denial of Electronic Surveillance Below Was Legally Insufficient.

Title 18 United States Code §3504 requires the government to respond to every claim of illegal electronic surveillance by a federal court litigant. See Gelbard v. United States, 408 U.S. 41 (1972); United States v. Huss, 482 F.2d 38, 40 (2d Cir. 1973).

This response may be challenged by the party claiming illegal surveillance on the basis of legal or factual inadequacy or inaccuracy. United States v. Huss, supra; United States v. Boe, 491 F.2d 970(8th Cir. 1974) (concurring opinion); United States v. Alter, 482 F.2d 1016 (9th Cir. 1973); In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973); In re Horn, 458 F.2d 468, 471 (3rd Cir. 1972); United States v. Doe

[Marx], 451 F.2d 466 (1st Cir. 1971); United States v. Alderisio, 424 F.2d 20 (10th Cir. 1970) (criminal case). Hearings into adequacy were allowed or ordered in United States v. Alter, supra; In re Tierney, supra; United States v. Fannon, 435 F.2d 364 (7th Cir. 1970), cert. denied, 401 U.S. 1012 (1971) (Criminal case); United States v. Alderisio, supra; United States v. Ahmad, 347 F.Supp. 912 (M.D. Pa. 1972), aff'd in part and rev'd in part sub nom. United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973) (criminal case); and United States v. Desist, 277 F. Supp. 690 (S.D.N.Y.), aff'd, 384 F.2d 889 (2nd Cir. 1967), aff'd, 394 U.S. 244 (1969) (quoting order of Court of Appeals), But see Beverly v. United States, 468 F.2d 732 (5th Cir. 1972) (hearing not mandatory).

Moreover, no prima facie showing need by made by a party to trigger the government's duty to respond; a barre claim is insufficient. United States v. Toscanino, 500 F.2d 267(2d Cir. 1974); Vielguth v. United States, ___ F.2d ___ (9th Cir. 1974).

In this case a claim of unlawful electronic surveillance was made by the defendants below, and a denial was filed by the government. CIA director Colby's testimony last month shows that the government's denial was inadequate.

In light of the information now before the court, there is no reason to believe that the agencies listed in the Prosecutor's affidavit below were the only governmental agencies that might have been involved in electronic surveillance. On the contrary, the information now before the court suggests that the Central Intelligence Agency, an agency not named in the affidavit, is one quite likely to have been involved in the investigation of this case, and possibly in the use of illegal electronic surveillance.

The agency has acknowledged investigating "radical dissidents." Regardless of how that vague term is defined, members of the Black Panther Party and Black Liberation Army are encompassed by it, and it is entirely reasonable to suspect that the defendants may have been among the thousands surveilled and in some cases illegally eavesdropped upon by the CIA.

Colby's testimony makes the more general point that the prosecutor was incorrect when he suggested that the agencies of whom he inquired were the only ones that were likely to have engaged in wiretapping. (The prosecutor was of course careful to state that this suggestion was based on hearsay; Colby's affidavit shows it to have been inaccurate hearsay.) There is therefore no longer any

basis for accepting government denials which do not encompass agencies such as the Defense Department, Army, Navy, and Air Force as well as the C.I.A., unless someone of comparable responsibility and with comparable access to information as CIA director Colby can assert as to those agencies that no electronic surveillance has occurred.

The Colby testimony therefore provides the answer to the issue reserved by this court in United States v. Huss, supra, 482 F.2d at 42n.5. To be meaningful, the government's denial of surveillance must be comprehensive, and must include all agencies which may have surveilled the defendants particularly where the agency--as the CIA--regularly exchanged information with the FBI. United States v. Alter, supra, establishes stringent guidelines for a government denial of surveillance. This court need not go as far as Alter, although it would be entirely appropriate to do so. The denial in this case is inadequate because the basis asserted by the prosecutor for selection of agencies to check for surveillance has been shown on the public record, after the assertion was made, to be inadequate. Whatever general rules the court may wish to establish for denials of unlawful surveillance, a denial must at least

pass the test of not being demonstrably misinformed and incorrect about the facts which form its foundation.*

In fact, the reconsideration of the government's denial of surveillance urged here has already been ordered by at least one court in the wake of the Colby disclosures. In an unreported case, the United States District Court for the Northern District of California (Zirpoli, J.), has stayed a contempt finding entered against a recalcitrant grand jury witness after the witness brought the Colby testimony to the court's attention. The court ordered

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*Footnote: The denial in this case were inadequate for many other reasons as well, which need only be summarized here. These include 1) One of the premises as to which a search was requested was describe incorrectly as 2026 7th Street rather than 2026 7th Avenue. (App. 19); 2) The Drug Enforcement Administration said only that the defendants "have not been identified as being participants in conversations overheard in any electronic surveillance by this Agency," (App. 27) without any indication of the significance to be attached to this failure;

the government to affirm or deny electronic surveillance by the CIA. In re Grand Jury Witness Cynthia Garvey (No. CR 74-32 M) (N.D. Cal., Feb. 3, 1975). A similar course is mandated here.

B. This Case Should Be Remanded to the District Court For a Hearing on the Issue of Unlawful Electronic Surveillance and Taint.

In Gelbard v. United States, supra, the government attempted to deny unlawful surveillance in the United

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Footnote (cont.)

3) Records of the Secret Service (App. 21), Internal Revenue Service (App. 22); Bureau of Alcohol, Tobacco, and Firearms (App. 25); U.S. Customs' Service and U.S. Postal Service have similar ambiguities which render them inconclusive; 4) The responses of none of the agencies has been subjected to cross-examination or tested in any other way, despite the long series of inaccuracies and retractions which is the history of governmental denial of electronic surveillance, see, e.g. Kolod v. United States, 390 U.S. 136 (1968); United States v. Korman, 93 S. Ct. 93 (1972) (grand jury witness) (reversed on other grounds); Smilow v. United States, 409 U.S. 944 (1972) (grand jury witness); Sellers v. United States, 396 U.S. 9 (1969); Tillman v. United States, 395 U.S. 830 (1969); Balistrieri v. United States, 395 U.S. 710 (1969); Jones v. United States, 395 U.S. 462 (1969); Mrkonjic-Ruzic v. United States, 394 U.S.

States Supreme Court although it had not done so before. The Supreme Court rejected the proffered denial; it instead deemed the appropriate course to be to remand the

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Footnote (cont.)

454 (1969); Markis v. United States, 387 U.S. 425 (1967 (two cases); Hoffa v. United States, 387 U.S. 231 (1967); Granello v. United States, 386 U.S. 1019 (1967) (denying certiorari); O'Brien v. United States, 386 U.S. 345 (1967); Schipani v. United States, 385 U.S. 372 (1966); Black v. United States, supra; Giordano v. United States, 394 U.S. 310 (1969). See also Gelbard v. United States, supra at 61-62 n. 23.

Similar late admissions, but in the courts of appeal have occurred in at least the following cases: United States v. Buck, No. 73-1952 (9th cir., July 27, 1973) (appeal from order holding defendant in contempt for refusal to provide handwriting exemplar); In re Tierney, supra (grand jury witness); In re Horn, supra (trial witness); United States v. Cook, 432 F.2d 1093 (7th Cir. 1970), cert. denied, 401 U.S. 996 (1971) (Douglas, J., dissenting); United States v. Stassi, 410 F.2d 946 (5th Cir. 1969), aff'd after remand, 431 F.2d 353 (5th Cir. 1970); United States v. Hoffa, 402 F.2d 380 (7th Cir. 1968), vacated sub nom. Giordano v. United States, 394 U.S. 310 (1969), aff'd after remand, 436 F.2d 1243 (7th Cir. 1970), cert. denied, 400 U.S. 1000 (1971); Gradsky v. United States, 376 F.2d 993 (5th Cir.), vacated in part sub nom. Roberts v. United States, 389 U.S. 18 (1967); United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971) (on remand, reporting admission in court of appeals); United States v. Friedland, 316 F.Supp. 459 (S.D.N.Y. 1970), aff'd, 441 F.2d 855 (2nd Cir.), cert. denied, 404 U.S. 867 (1971) (same); United States v. Desist, 277 F. Supp. 690, 702 (S.D.N.Y., aff'd, 384 F.2d 889 (2nd Cir. 1967), aff'd, 394 U.S. 244 (1969)

issue "for the District Court to consider in the first instance." 408 U.S. at 61-62 n.23. Likewise, in United States v. Alter, supra, the Court of Appeals, after hold-

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Footnote (cont.)

(same); United States v. Taglianetti, 274 F. Supp. 220, 221-22 (D.R.I. 1967), aff'd, 398 F.2d 558 (1st Cir. 1968), aff'd, 394 U.S. 316 (1969) (same).

In the district courts, denials have also occasionally been retracted, and admissions substituted: e.g., United States v. Seale, 461 F.2d 345, 364-66 (7th Cir. 1972) (on appeal, reporting admission in district court after trial); United States v. Buck, Nos. 73-290 SC and 73-345 SC (N.D. Cal. 1973) (after admission in court of appeals, supra); United States v. Russo (pentagon papers), No. 9373 - WMB-CD (C.D. Cal); United States v. Hoffa, 307 F. Supp. 1129 (E.D. Tenn. 1970), aff'd, 437 F.2d 11 (6th Cir.), cert. denied, 402 U.S. 988 (1971) (after admission in Supreme Court in Giordano v. United States, supra); United States v. Taglianetti, supra (additional admission after admission in court of appeals, supra); United States v. Hoffa, 273 F. Supp. 141 (N.D. Ill. 1967), aff'd, 402 F.2d 380 (7th Cir. 1968) (after admission in Supreme Court in Hoffa v. United States, supra and in addition to admission in court or appeals, supra).

ing an affidavit submitted to the District Court to have been insufficient, remanded the case with the observation that "We do not attempt to anticipate the content of a new affidavit or to describe the procedure by which Alter will be given the meaningful opportunity to which he is entitled to test its legal and factual sufficiency." 482 F.2d at 1027 n.19.

So in this case the appropriate starting place for an inquiry into surveillance and taint is the District Court. Issues with respect to adequacy of the denial, in the event of a denial, or of taint in the event of an admission, can be dealt with by that court in the first instance rather than having this court attempt to adjudicate issues as to which the facts have not been developed.

C O N C L U S I O N

For all the reasons set forth in the briefs of co-defendants, the case ought to be remanded and the indictments ordered dismissed, or, failing that, ought to be reversed and remanded for a new trial, and for all the reasons stated in this brief, the case ought to be remanded with instructions to the District Court to conduct

an inquiry into the existence and taint of unlawful electronic surveillance.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. No. 74-2493

MICHAEL ALSTON,

Defendant-Appellant.

STATE OF CONNECTICUT)
)
COUNTY OF NEW HAVEN) ss: AFFIDAVIT

I, David Rosen, being first duly sworn, do depose and say:

1. I am an attorney admitted to practice in this court and in the courts of the State of Connecticut.

2. I am the attorney of record for one of the appellants in this matter, Michael Alston.

3. I am informed and believe that on January 15, 1975, William E. Colby, director of the Central Intelligence

Agency, submitted to the Appropriations Committee of the United States Senate a report regarding certain activities of the Central Intelligence Agency within the national borders of the United States.

4. I am informed and believe that on January 16, 1975, The New York Times newspaper published the entire text of said report by William E. Colby, and that the text of said report appears on pages 30 and 31 of said newspaper.

5. Included in the report by Director William E. Colby, according to the report of The New York Times, referred to above, are the following statements:

> In mid-1967, the U.S. Government was concerned about domestic dissidence. You will recall that President Johnson on July 27, 1967, appointed a National Advisory Commission on Civil Disorders....
>
> On August 15, 1967, the director established within the C.I.A. Counter-intelligence Office a unit to look into the possibility of foreign links to American dissident elements....
>
> Later the same year, the C.I.A. activity became part of an interagency program in support of the national commission, among others.
>
> Periodically thereafter, various reports were drawn up on the foreign aspects of the antiwar, youth and similar movements, and their possible links to American counterparts. Specific information was also disseminated to responsible United States agencies....

In 1970... the Huston plan was not implemented, but an interagency evaluation committee, coordinated by Mr. John Dean, the Counsel to the President, was established. The committee was chaired by a representative of the Department of Justice, and included representatives from F.B.I., D.O.D., State, Treasury, C.I.A. and N.S.A. Its purpose was to provide coordinated intelligence estimates and evaluations of civil disorders, with C.I.A. supplying information on the foreign aspects thereof.

Pursuant to this, C.I.A. continued its counterintelligence interest in possible foreign links with American dissidents....

In the course of this program, the agency worked closely with the F.B.I..... The agency passed to the F.B.I. information about Americans it learned from its intelligence or counterintelligence work abroad....

In order to obtain access to foreign circles, the agency also recruited or inserted about a dozen individuals into American dissident circles in order to establish their credentials for operations abroad. In the course of the preparatory work or on completion of a foreign mission, some of these individuals submitted reports on the activities of the American dissidents with whom they were in contact. Information thereby derived was reported to the F.B.I., and in the process the information was also placed in C.I.A. files.

In March, 1974, the director terminated the program and issued specific guidance that any collection of counterintelligence information on Americans would only take place abroad and would be initiated only in response to requests from the F.B.I. or in coordination with the F.B.I., and that any such information obtained as a byproduct of foreign intelligence activities would be reported to the F.B.I.

> In the course of this program, files were established on about 10,000 citizens in the counterintelligence unit.

6. In summary, William Colby reported on January 15, 1975, that from mid-1967 until March, 1974, the Central Intelligence Agency took part in investigation of "American dissidents," within the national boundaries of the United States.

7. Elsewhere in the same report, William Colby stated that at various times between 1951 and 1971, the Central Intelligence Agency used warrantless electronic surveillance and home burglaries as means to obtain information.

8. In that portion of the report quoted above, William Colby stated that the Central Intelligence Agency took part in a regular exchange of information with the F.B.I., among other agencies, concerning the activities of "American dissidents."

9. On information and belief the defendants in this case were all closely associated with the Black Panther Party and the Black Liberation Army, both organizations which have been characterized as "hard-core dissident" by government agencies, and both of which have been suspected by government agencies of having connections.

with foreign governments or groups in foreign countries.

10. In fact, the connection of the defendants to these groups is so close that each defendant has listed 2026 7th Avenue, New York, New York, as a business address, and this address is of headquarters of the Black Panther Party in New York City.

11. All defendants, therefore, are likely targets of any surveillance by the C.I.A.

Dated at New Haven, Connecticut this 14th day of February, 1975

David Rosen

Subscribed and sworn before me at New Haven this 14th day of February, 1975.

Edward J. Dolan

Commissioner of the Superior Court

C E R T I F I C A T I O N

This is to certify that a copy of the foregoing brief, together with supporting documents, has been mailed first class mail postage prepaid this 14th day of February, 1975, to Peter A. Clark, Esq., 141 Church Street, New Haven, Conn., Thomas Clifford, Esq., 770 Chappel Street, New Haven, Connecticut, and John R. Williams, Esq., 265 Church Street, New Haven, Connecticut.

David N. Rosen